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Supreme Court of the United States

..... Term, 1975

No. 75-285

RICHARD LYNN BARNETT,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

..... Term, 1975

No.....

RICHARD LYNN BARNETT,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI FROM UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Petitioner, Richard Lynn Barnett, and for his petition for a Writ of Certiorari states the following:

OPINION BELOW

The opinion of the Court of Appeals, Fifth Circuit, attached hereto as Appendix A, and is reported in 512 F.2d 811.

JURISDICTION

The judgment of the Court of Appeals, Fifth Circuit, was entered May 7, 1975 (Appendix B). Petition for rehearing was denied on July 25, 1975. (Appendix C). The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether a pistol found on the person of Petitioner should have been excluded from evidence by the Trial Court on the ground that the arresting government agent did not have probable cause to arrest Petitioner.

II.

Whether the trial Judge's attack on the credibility of the government's chief witness and codefendant, when recalled by Petitioner, was a harmless error or was the remark so prejudical as to deny Petitioner a fair trial. Whether the trial judge's admonishment was effective in the minds of the jury.

III.

Whether the Trial Court denied Petitioner the right of cross-examination.

CONSTITUTIONAL PROVISIONS

United States Constitution.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

In the Northwood Hills Shopping Center parking lot, Dallas, Texas, at approximately 5:30 P.M., on December 12, 1972, Appellant was arrested, while sitting in his automobile, by special agents of the Drug Enforcement Administration. A pistol was taken from his person. At the same time Michael Ray Carey was arrested in a white van truck that contained 123 ounces of methamphetamine that he and Billy Joe Lee had contracted to sell to special agent Jerry Glass for $13,550.00. Still in another area of the parking lot Billy Joe Lee was also arrested. Both Billy Joe Lee and Michael Ray Carey had all counts in their indictments dismissed, save one, in exchange for their testimony.

On December 8, 1972, Jerry Glass met with Michael Ray Carey and Billy Joe Lee at Michael Ray Carey's residence located at the Casa Cipango Apartments where a discussion took place regarding the purchase of 123 ounces of methamphetamine. Jerry Glass purchased one sample bottle from Michael Ray Carey. On December 8, 1972, Michael Ray Carey accompanied Jerry Glass to the Greyhound Bus Station and Jerry Glass placed $30,000.00 in a locker as front

money, and again met with Michael Ray Carey and Billy Joe Lee on December 9, 1972, to discuss the purchase of 123 ounces of methamphetamine. On December 12, 1972, Jerry Glass received a telephone call from Billy Joe Lee and Michael Ray Carey to confirm the delivery of the drug. Arrangements were made with Jerry Glass to deliver the methamphetamine in a white van truck on the parking lot of the Northwood Hills Shopping Center at approximately 5:00 P.M.

Jerry Glass met with Michael Ray Carey at the white truck, subsequently leaving for approximately thirty (30) minutes after being told by Michael Ray Carey the "stuff" had not yet arrived. During this thirty (30) minutes Jerry Glass informed other agents that a purchase was about to be made. Several agents stationed themselves around the shopping center parking lot, keeping a surveillance of the truck in the parking lot.

Between 5:00 P.M. and 5:30 P.M., a 1969 Dodge Charger was observed as it drove up alongside the white van truck, the only passenger alighted and the Dodge Charger drove out of sight. There is a conflict as to who was driving the automobile at this time. Approximately ten (10) minutes later, what appeared to be the same Dodge Charger was observed coming down a street next to the shopping center, pulled into the shopping center lot and parked two (2) spaces from two (2) agents conducting surveillance approximately one hundred (100) yards in distance from the

white van truck. By radio, these agents were advised of certain activities and apparently because of the similarity of this vehicle and the one previously seen next to the van truck, these agents walked to Appellant's vehicle and immediately placed him under arrest. A pistol was found in a shoulder holster on Appellant.

JUDGMENT AND JURISDICTION OF COURT OF FIRST INSTANCE

Appellant was tried by a jury with a codefendant, Demetri Thor, and found guilty on three (3) counts. The Honorable Judge William M. Steger assessed a maximum of five (5) years and $15,000.00 fine to run consecutively on one (1) count of possession with the intent to distribute a controlled substance and a similar penalty for the second count of conspiring to possess and distribute a controlled substance, both in violation of Title 21, Section 841(a) and ten (10) years for possession of a firearm during the commission of a felony, in violation of Title 18, United States Code, Section 924(c)(2), to run concurrently with the above two (2) counts.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL JUDGE ERRED BY ADMITTING A PISTOL INTO EVIDENCE BECAUSE IT WAS THE PRODUCT OF AN ILLEGAL SEARCH, SINCE ARRESTING OFFICERS HAD NO PROBABLE CAUSE FOR PETITIONER'S ARREST.

The Fourth Amendment to the United States Constitution requires probable cause for a legal arrest. If a warrantless arrest is constitutionally valid, it depends upon whether at the moment of arrest, the arresting officer possesses knowledge of facts and circumstances received from trustworthy sources, that would be sufficient to warrant a prudent man in believing that the person arrested had committed or was committing a criminal offense.

Beck v. Ohio, 379 U.S. 89; *Wong Sun v. United States,* 1963, 371 U.S. 471; *United States v. Seay,* 1970, 432 F.2d 395; *Kiel v. United States,* 1969, 406 F.2d 1323. We must consider the factual and practical probabilities based in light of our everyday life. *Draper v. United States, 1959, 358 U.S. 307. United States v. Seay,* supra. Probable cause for a warrantless arrest must be determined by analyzing all of the facts known to the arresting officer. *United States v. Lopez-Ortiz,* 1974, 492 F.2d 109, *United States v. Doyle,* 1972, 456 F.2d 1246.

Mere presence at the scene of a crime has been held by this court not to create sufficient probable cause, to warrant a warrantless arrest. *United States v. Michael Di Re* 332 U.S. 581; *United States v. Joiner,* 1970, 429 F.2d 489; *Newsom v. United States,* 1964, 335 F.2d 237; *United States v. Jennings,* 1972, 468 F.2d 111; *United States v. Strickland,* 1974, 490 F.2d 378.

The Fifth Circuit rendered a decision which directly conflicts with a Ninth Circuit decision on al-

most the identical facts and virtually the same issue. In *United States v. Strickland,* supra, the Ninth Circuit found a lack of probable cause for the arrest. Strickland, like the petitioner, was arrested on December 12, 1972. Strickland's automobile was observed repeatedly passing a short distance from a point at which a quantity of cocaine was to be delivered and he was observed looking in the direction of the delivery point as he drove by. When he was arrested the officers found a loaded gun in his possession.

Petitioner was arrested because his Dodge Charger automobile appeared next to the white van truck, where the sale of narcotics was to take place, in a very large shopping center's parking lot and within ten to fifteen minutes later after parking next to the arresting officers vehicle which was approximately 100 yards from the white van truck.

There is a considerable amount of conflict as to whether or not the petitioner was the driver of the automobile when it appeared next to the van truck. The arresting officers testified they were approximated 100 yards from the van and they could not see what was going on when a Dodge automobile stopped by the van, although one agent thought petitioner was driving the Dodge. Billy Joe Lee, in his original testimony, stated that he was the driver of the Dodge Charger when it stopped beside the white van. A government agent testified that the occupant, not the driver, alighted from the Dodge when it appeared

next to the white van. If the government's own witnesses' testimony is to be believed, and surely it must be, then Billy Joe Lee drove the Dodge to the van and a third person alighted therefrom.

Not one arresting officer testified they knew Petitioner's name, a description of petitioner, that petitioner would be participating in the sale or anything else about Petitioner prior to his arrest except that one agent thought Petitioner was the driver of the Dodge as it drove up beside the van.

Under these facts, when viewed objectively, it is clear that a reasonably prudent man would lack sufficient knowledge to believe that Petitioner had committed, or was committing an offense, when arrested while lawfully sitting in his own vehicle in a public shopping center parking lot.

Although the facts in Petitioner's case should be decided by the guide lines as set forth in *Beck v. Ohio,* supra, *Wong Sun v. United States,* supra, and *United States v. Michael Di Re, supra,* it appears that in the future the Court of Appeals will find probable cause for a warrantless arrest based on less knowledge.

II

THE TRIAL JUDGE ABUSED HIS DISCRETION BY PERSONALLY ATTACKING THE CREDIBILITY OF BILLY JOE LEE'S TESTIMONY THAT WAS OF BENEFIT TO PETITIONER, BY STATING HIS DISBELIEF OF SUCH TESTIMONY AND BY CALLING WITNESSES ON THE COURT'S MOTION TO DISCREDIT THAT PART OF BILLY JOE

LEE'S TESTIMONY THAT WAS BENEFICIAL TO PETITIONER;

Petitioner does not question the right of a Federal judge to comment on evidence presented at trial, however, the comments made by the trial judge departed so far from the accepted and usual course of judicial proceedings as to call for this court's intervention. In *Quercia v. United States*, 1933, 289 U.S. 466, this court held that

> "the trial judge (is) to use great care that an expression of opinion upon the evidence should be so given as not to mislead and especially that it should not be onesided".

A trial judge should avoid any appearance of being partisan to the prosecutor or in any way exhibit a prosecutors zeal. *United States v. Cesneros*, 1974, 491 F.2d 1068, *United States v. Musgrave*, 1971, 444 F.2d 755, *United States v. Jackquillon*, 1972, 469 F.2d 380, His comments and opinions must be within responsible limits and any intervention must be proper and made in a fair effort to clarify an issue. His intervention cannot be prejudicial to the defendant. *Bursten v. United States.*, 1968, 395 F.2d 976, *Moody v. United States*, 1967, 377 F.2d 175. However, more important than not showing any favoritism the judge must not in any way trespass on the jury's functions or responsibilities and the most important of these is the jury's right to assess credibility in finding the facts. It is not within a judge's right to impeach the credibility of a witness. *United States v. Quercia, supra.*

The government's key witness was Billy Joe Lee, a codefendant. He was the only witness who testified that Petitioner knew or in any way contributed to the sale of the drugs to Jerry Glass. When Petitioner recalled Billy Joe Lee two days later he denied all of the facts to which he had previously testified, with respect to the Petitioners participation in the drug sale. Billy Joe Lee testified he thought Special Agent Glass and Assistant United States District Attorney Harold Jaquet wanted him to implicate Petitioner and in return they would go easy on him. At that point, the trial judge interrupted the examination and proceeded to question Billy Joe Lee. When asked by the court if Mr. Glass or Mr. Jaquet had asked him to say something that was not true, he replied "yes", whereupon the court responded "I don't believe that." The judge later weakly admonished the jury that they were the sole judges of the facts, however he did not admonish the jury that they were the sole judges of the credibility of a witness. It is important to note that the judge's statement to the jury was not made immediately after his remarks, but rather after the petitioner had completed his examination of the witness.

The trial court's statement is very similar to that in *United States v. Cisneros*, supra, where the credibility of the witness was of the utmost importance. There the judge stated that "somebody was lying" which was a reversible error. In reality that is exactly what the judge said by indicating to the jury

that he didn't believe Billy Joe Lee. In *United States v. Musgrave*, supra, it was pointed out as a matter of judicial notice that juries are very easily swayed by anything that a trial judge might say and that some comments are so prejudicial that not even the strongest admonition will cure the error.

III.
THE COURT OF APPEALS DENIED PETITIONER THE RIGHT OF CROSS EXAMINATION OF GOVERNMENT WITNESS.

The Defendant's right to cross-examine a witness is guaranteed him by the Sixth Amendment to the United States Constitution. Such a right is so protected that it is reversible error for the trial judge to deny Defendant cross-examination of a witness, irrespective of a lack of prejudice because of the denial. *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 [1966]; *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 [1967]. During a trial a Defendant possesses the right of cross-examination as a matter of right. *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 [1931]. The Defendant may intentionally relinquish his right of cross-examination. *Johnson v. Zerlest*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 [1938]. Every reasonable presumption, against the waiver of cross-examination, must be granted to that Defendant lest he may have been denied the right. *Glasser v. United States*, 942, 315 U.S. 60. It is not necessary for Defendant to show prejudice in order to demonstrate the commission of reversible error. *Brookhart v. Janis*, supra.

In *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 [1973], Defendant was convicted of a murder and thereafter one Mr. McDonald signed a confession to the crime. At Defendant's pretrial hearing, McDonald appeared and Defendant called him as a witness, introducing the confession. The State established the confession had subsequently been repudiated. Defendant renewed his motion to call McDonald as an adverse witness which the trial judge denied, ruling he called him as his own witness and therefore, vouches for his credibility. This Court held he was not only precluded from cross-examining McDonald, but was restricted in the scope of his direct examination by the trial judge's corollary requirement that he is bound by anything the witness might say.

Billy Joe Lee testified against Petitioner on direct examination and with the Court's permission Petitioner passed the witness but reserved the right to cross-examine. After the Government rested Billy Joe Lee was called by Petitioner. Thereafter, the judge allowed the government to impeach this witness with Petitioner making numerous objections, all being overruled. The judge denied cross-examination when he made Billy Joe Lee Petitioner's witness, even though Petitioner had called Billy Joe Lee and proceeded on the assumption he had reserved the right to call Billy Joe Lee for cross-examination purposes.

The Court of Appeals holds that Lee was called by the defense and therefore the government could in fact impeach Lee. This is exactly the same reasoning that was reversed by this court in *Chambers v. Mississippi*, supra.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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James Frederick Newth
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CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the foregoing Petition for Writ of Certiorari, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 23 day of August, 1975.

James Frederick Newth

James Frederick Newth

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Demetri THOR and Richard Lynn
Barnett, Defendants-Appellants.**

No. 74-3034.

United States Court of Appeals,
Fifth Circuit.

May 7, 1975.

Defendants were convicted in the United States District Court for the Northern District of Texas at Dallas, William M. Steger, J., sitting by designation, of possessing methamphetamine with intent to distribute and conspiring to manufacture and possess with intent to distribute the same, and one defendant was also found guilty of carrying a firearm unlawfully during the commission of a felony, and they appealed. The Court of Appeals, Bell, Circuit Judge, held that officers who were present at scene of drug sale for purpose of apprehending those participating in sale to agent and who knew that the person delivered to the scene by defendant had a package containing what purported to be methamphetamine had

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(Appendix A)

probable cause for defendant's arrest and pistol taken from defendant's person at time of arrest was admissible; that trial court's error, if any, in remarking "I don't believe that" after witness answered in the affirmative question whether prosecutor had told witness to testify to something that was not true was harmless in light of the overwhelming evidence against defendant; that written confessions and formula for manufacturing methamphetamine given to federal officers in Dallas were not tainted by confession given a few weeks earlier to state officers in California; and that where defendant was arrested in Oregon in January of 1974 and demanded trial on July 8, 1974, and trial began July 17, 1974, delay did not rise to constitutional proportions.

Affirmed.

1. Arrest 63.4(17)
   Criminal Law 394.4(13)

Officers who were at scene of arrest for purpose of apprehending participants in drug sale and who knew that person delivered to the scene by defendant had package containing what purported to be methamphetamine had probable cause to arrest defendant and pistol taken from defendant's person at time of arrest was admissible in evidence. 18 U.S.C.A. § 924(c)(2).

2. Criminal Law 1166.22(4)

Trial court's error, if any, in stating "I don't believe that" when witness answered affirmatively to

court's inquiry if prosecutor had told witness to testify to something that was not true was harmless in light of the overwhelming evidence against defendant.

3. Witnesses 321

Where defense counsel did not cross-examine or reserve cross-examination of witness who testified for Government on direct, and two days later, after the Government rested, the witness was called by defense counsel and repudiated his earlier testimony insofar as it implicated defendants, Government was not barred from seeking to impeach the witness on theory that witness was the Government's witness.

4. Criminal Law 665(2)

Permitting agent who made drug purchase to remain in courtroom during trial of drug trafficking charges as representative of Government despite invocation of rule to exclude witnesses was not an abuse of discretion. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

5. Criminal Law 519(2)

Written confessions and formula for manufacturing methamphetamines, given to federal officers in Dallas, were not tainted by confession given a few weeks earlier to state officers in California in absence of any claim of working arrangement between state and federal officers.

6. Searches and Seizures 3.3(1, 4)

Where defendant in plain view of arresting officers removed a pistol from his belt and threw it into vehicle, officers' seizure from automobile of newspaper clipping giving details of drug arrests of defendant's confederates and receipt for safe in which the drugs had been placed, was justified under the plain view and exigent circumstances probable cause exception to the Fourth Amendment warrant requirement. U.S.C.A. Const. Amend. 4.

7. Indictment and Information 7

Interval between commission of drug offense on December 12, 1972 and defendant's indictment on September 26, 1973 was not unreasonable or prejudicial. U.S.C.A.Const. Amend. 5.

8. Criminal Law 573

Where defendant was arrested in Oregon in January 1974, resisted removal to Texas on Texas warrant and on July 8, 1974 demanded a trial and was tried beginning July 17, 1974, and none of the missing witnesses could have offered evidence relevant to defendant's defense, given his confession, there was no denial of constitutional right to speedy trial. U.S.C.A.Const. Amend. 6; Fed.Rules Crim.Proc. rule 48(b), 18 U.S.C.A.

Appeals from the United States District Court for the Northern District of Texas.

Before BELL, THORNBERRY and GEE, Circuit Judges.

BELL, Circuit Judge:

Appellants Thor and Barnett were convicted of possessing with intent to distribute a controlled substance (methamphetamine) in violation of 21 U.S.C.A. § 841(a), and of conspiring to manufacture and possess with intent to distribute the same in violation of 21 U.S.C.A. § 841(a). Additionally, in a consolidated case, Barnett was found guilty of carrying a firearm unlawfully during the commission of a felony in violation of 18 U.S.C.A. § 924(c)(2). Others were charged with appellants in the drug counts. Two of these, Carey and Lee, pleaded guilty and testified at the trial. We affirm.

The evidence adduced at trial showed that Agent Glass of the Drug Abuse Law Enforcement Agency had arranged a drug sale with Carey to be consummated in a Dallas shopping center parking lot on December 12, 1972. According to plan, Glass met Carey at a white panel truck (an old bread truck) in the parking lot. A short time later appellant Barnett, accompanied by Lee, drove by the truck in a Dodge Charger, letting Lee out of the vehicle with the methamphetamine. [Lee and Carey were forthwith arrested.] [Barnett was arrested in the same parking lot five to ten minutes later, after he had driven a short distance from the truck and returned.] He was

relieved at the time of his .357 magnum pistol. Federal officers were deployed within approximately one hundred yards of the white bread truck and testified as to their observations. Thor was tied to the transaction through ownership of the truck, purchase of a safe in which the methamphetamine was placed by Lee in the truck, and purchase of the labels or the methamphetamine bottles. He witnessed the transaction from a safe vantage point and left the state when he realized that his confederates had been arrested.

[1] Barnett assigns three errors. The first goes only to him. He contends that there was no probable cause for his arrest at the parking lot and hence the pistol should have been suppressed. We disagree. There was ample probable cause to support Barnett's arrest. [The officers saw him deliver Lee and a package to the truck in the parking lot and leave in a vehicle being driven by him.] The officers were at the scene for the purpose of apprehending those participating in the sale to Agent Glass. Barnett returned to the scene within five to ten minutes and was then arrested and the pistol removed from a shoulder holster. [By the time of his arrest, the surveilling officers knew that the package delivered by Lee contained what purported to be the methamphetamine.]

Barnett's other assignments of error are adopted by Thor. Both have to do with the testimony of co-actor Lee who, after testifying against Barnett for the government, was called two days later by Barnett and thereupon repudiated his testimony. He stated that in his earlier testimony, he was only saying what the prosecutor and drug agent had told him to say.

[2] At this point the court made a remark which would have been better left unsaid but which we do not find to be reversible error. The court, after inquiring if Lee was saying that the prosecutor told him to testify to something that was not true and after Lee had answered in the affirmative, said to Lee, "I don't believe that." The court took corrective action almost immediately in terms of two cautionary instructions. The small import of the statement is seen in the fact that no motion for a mistrial or even for a cautionary instruction was made, defense counsel simply remarking that the court had reflected on "the competence of the evidence." We need not reach any question as to the right of the trial judge to comment on the evidence where the safeguard of a cautionary instruction is supplied. *See* Quercia v. United States, 1933, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321; United States v. Jacquillen, 5 Cir., 1972, 469 F.2d 380. Rather, we hold that the error here, if any, was harmless in light of the overwhelming evidence against Barnett, the contrary ear-

lier testimony of Lee, and his written confession to the contrary. *Cf.* Chapman v. California, 1967, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 and Harrington v. California, 1969, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284, on harmless error.

[3] This occurrence ties in to the other assertion of error in connection with witness Lee. He testified for the government on direct. There was no cross-examination and no reservation whatever by defense counsel as to delaying cross-examination. As stated, two days later, after the government rested, Lee was called by Barnett's counsel and repudiated his earlier testimony insofar as it implicated Barnett. The government then offered Lee's confession to impeach him and Barnett's counsel contended that this was improper because he had Lee on cross-examination and the government could not impeach its own witness. The plain answer to this claim is that Lee was called as a defense witness and any claim to the contray is spurious.

[4] Appellant Thor claims error in the action of the trial court in permitting Agent Glass to remain in the courtroom as the representative of the government despite the invocation of the rule to exclude witnesses. This was a discretionary matter with the court and we find no abuse of discretion. Del Cristo v. United States, 5 Cir., 1964, 327 F.2d 208.

The remaining assignments of error are also by

Thor. He contends that his two written confessions together with the formula for manufacturing methamphetamine, given to federal officers in Dallas, were inadmissible because of the taint of a confession given a few weeks earlier to state officers in California. The vice found in the California confession was based on the four day delay of the state officers in taking Thor before a state magistrate.

[5] The ruling of the district court denying the admission of the California confession on this ground gave Thor more than his due under the decisions of this circuit. Thus the short answer to his allegation of taint is that there was no taint. In Kulyk v. United States, 5 Cir., 1969, 414 F.2d 139, we held that a statement made to a state officer while the defendant was detained in violation of the Georgia statute requiring that a prisoner be brought before a magistrate within 48 hours of arrest was admissible in a trial on federal charges. Thor was not in federal control when he gave the California confession, and there is no factual basis whatever, indeed no claim, of a working arrangement between state and federal officers to obtain such a confession. *Cf.* United States v. Rollerson, 5 Cir., 1974, 491 F.2d 1209.

[6] A receipt for the safe, discussed *supra*, and a newspaper clipping giving details of the December 12, 1972 shopping center drug arrests were found in Thor's vehicle when he was arrested in California and while it was being inventoried. There was no er-

ror in admitting these items. He was arrested after he removed a pistol from his belt as he approached his vehicle and after throwing it into his vehicle, all in the plain view of the arresting officers. The plain view and exigent circumstances probable cause exception to the Fourth Amendment warrant requirement is well known. *See, e. g.,* United States v. Lopez-Ortiz, 5 Cir., 1974, 492 F.2d 109; United States v. Cushnie, 5 Cir., 1973, 488 F.2d 81; United States v. Allen, 5 Cir., 1973, 472 F.2d 145; United States v. Ragsdale, 5 Cir., 1972, 470 F.2d 24.

Thor's last contention is that he was denied a speedy trial. Some detail as to dates will be helpful on this question. The drug arrests in Dallas were on December 12, 1972. Thor departed Dallas on the same date for Oklahoma. He was next heard of in California in late December 1972, when he was approached by state officers as a robbery suspect and arrested on the weapons charge heretofore discussed. He returned to Dallas on his own volition in January 1973 and gave the confessions there in January and February. He next appeared in Oklahoma in an undercover capacity for D.A.L.E., but had no contact with the agency after March or April 1973. Therefore, on September 26, 1973, he was indicted on the drug charges.

[7] Up to this point we find no violation of appellant's right to a speedy trial. The interval between commission of the drug offense and indictment did not extend beyond the applicable statute of limita-

tions and was not unreasonable. Moreover, no actual prejudice is shown, and there is no support for any Fifth Amendment due process claim that the delay was an intentional device to gain a tactical advantage over the accused. *See* United States v. Marion, 1971, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468; Kroll v. United States, 5 Cir., 1970, 433 F.2d 1282; United States v. McGough, 5 Cir., 1975, 510 F.2d 598.

An arrest warrant was issued for Thor on September 27, 1973 and was returned unexecuted on October 19, 1973. Subsequently, in January 1974, he was arrested in Oregon by state authorities while residing there under the alias Grady Fite. He resisted removal to Texas on the Texas warrant. He requested and received an identity hearing which resulted in an order for his removal to Texas dated February 26, 1974 on the drug charges.

[8] The real basis for the claim of a denial of the right to speedy trial began at this point. Thor describes what he terms an odyssey beginning March 12 in the form of a seventy-three day trip from Oregon to Texas by motor transportation. It develops that he spent from one night up to twelve nights in state or federal prisons en route plus a period of forty days in the federal prison at Marion, Illinois. The forty day delay at Marion was the result of a mix-up in identity between Thor and another prisoner who was in fact delivered to Dallas. (The government requests a remand to show Thor's part in this

mix-up in the event the court should determine that the delay may have resulted in the denial of a speedy trial).

Thor demanded a trial on July 8, 1974 and was tried beginning July 17, 1974. Counsel had been appointed for Thor on May 29, 1974. Having in mind the fugitive status of Thor after the indictment, the delay in removal from Oregon at this instance, the delay in reaching Texas, the demand for trial and the trial date, we apply the balancing test of Barker v. Wingo, 1972, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, where the court said:

> We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. . . .
>
> Id. at 533, 92 S.Ct. at 2193.

Cf. Moore v. Arizona, 1973, 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183; Prince v. State of Alabama, 5 Cir., 1975, 507 F.2d 693.

The thrust of Thor's contention under the balancing test is that the delay contributed to the disappearance of witnesses, interfered with his liberty and right of association, subjected him to public obloquy, drained his resources, and created anxiety in himself and his family. It may not be gainsaid that delay of trial can cause all of these results, but we must examine the delay in light of the facts of the particular case. Accordingly, we do not find that the delay rises to constitutional proportions. We have also examined the contention in light of Rule 48(b), F.R.Crim.P. and we find no violation of that rule.

As to missing witnesses, we find that none could have offered evidence relevant to Thor's defense, given his confession. There was no prosecutorial theory of his presence during the drug arrest. Thor's counsel had ample time within which to prepare such defense as he had. The interference with his liberty and right of association, any public obloquy, drain on resources and anxiety, was minimal when considered with his fugitive status, resistance to removal, and the time of the trial. Moreover, some of the witnesses were fugitives and had been since the indictment.

We find no denial of the Sixth Amendment right to speedy trial nor of a violation of Rule 48(b), F.R.Crim.P.

Affirm ed.

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-3034

D. C. Docket Nos CR-3-3273 & CR-3-3119 (B)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DEMETRI THOR AND RICHARD LYNN BARNETT,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before, BELL, THORNBERRY and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

May 7, 1975

Issued as Mandate:

(Appendix B)

U.S. COURT OF APPEALS
FILED
JUL 25 1975
EDWARD W. WADSWORTH
CLERK

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 74-3034

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DEMETRI THOR and RICHARD LYNN BARNETT,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(July 25, 1975)

Before BELL, THORNBERRY and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Richard Lynn Barnett filed in the above entitled and numbered cause be and the same is hereby denied.

(Appendix C)